IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
(Before Owens, P.J., and Markey and Murray, JJ.)

PRESERVE THE DUNES, INC.,
a Michigan Not For Profit Corporation,

Plaintiff-Appellee,

v

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY and **TECHNISAND, INC.,** a Delaware Corporation,

Defendants-Appellants.

Docket Nos. 122611, 122612

Court of Appeals No. 231728

Berrien County Trial Court
Case No. 98-3789-CE-S

BRIEF ON APPEAL --PLAINTIFF-APPELLEE PRESERVE THE DUNES, INC.

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The Appeal Involves a Ruling that a Provision of the Constitution, a Statute, Rule or Regulation, or Other State Governmental Action is Invalid

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Do the provisions of the Sand Dune Mining Act which forbid mining in a critical dune area by anyone who did not own the property before July 5, 1989, constitute a standard for the protection of natural resources that is applicable in an action under the Michigan Environmental Protection Act?

Court of Appeals' answer: Yes.
Plaintiff-Appellee's answer: Yes.
Defendants-Appellant DEQ's answer: No.
Defendant-Appellant Technisand's answer: Not addressed.

2. Under those provisions, was defendant-appellant Technisand ineligible for a permit to mine sand in the critical dune area involved in this case?

Court of Appeals' answer: Yes.
Plaintiff-Appellee's answer: Yes.
Defendant-Appellant DEQ's answer: Not addressed.
Defendant-Appellant Technisand's answer: No.

3. Assuming Technisand was improperly granted such a permit, was plaintiff-appellee entitled to challenge the validity of the permit in this action under the Michigan Environmental Protection Act?

Court of Appeals' answer: Yes.
Plaintiff-Appellee's answer: Yes.
Defendant-Appellant DEQ's answer: No.
Defendant-Appellant Technisand's answer: No.

4. Assuming the answers to the preceding questions are Yes, was plaintiff-appellee entitled to summary disposition in its favor, without further proof that Technisand's mining of the critical dune area was a "destruction or impairment" of a natural resource of the State?

Court of Appeals' answer: Yes.
Plaintiff-Appellee's answer: Yes.
Defendants-Apellant DEQ' answer: No.
Defendant-Appellant Technisand's answer: Not addressed.

JURISDICTION

This Court's jurisdiction is based on the Court's order dated March 25, 2003, granting defendants-appellants leave to appeal from the judgment of the Court of Appeals.

Plaintiff-Appellee Preserve the Dunes' responsive brief was initially due to be filed on June 24, 2003. A motion to extend the date by 21 days was filed on June 10, 2003.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 253 Mich App 263; 655 NW2d 263 and is reproduced in the Appendices of Defendants-Appellants. The orders and opinions of the circuit court are reproduced in the Appendices of Defendants-Appellants.

STATEMENT OF FACTS

Plaintiff Preserve the Dunes, Inc., a nonprofit corporation ("PTD"), brought this action in July 1998 under the Michigan Environmental Protection Act ("MEPA") against Technisand, Inc. and the Michigan Department of Environmental Quality ("DEQ") to enjoin Technisand from mining sand from a critical dune area known as the Nadeau Site Expansion (or the Taube Road Expansion) in Hagar Township, Berrien County, and to declare invalid a permit for such mining that had been issued by the DEQ. The complaint, as amended, charged in part that the proposed mining and the issuance of the permit violated MEPA because under Section 63702 of the Sand Dune Mining Act the DEQ is forbidden to issue a permit to mine a critical dune area unless the operator owned the land in question prior to July 5, 1989, and Technisand had not acquired the land until two years after that date. (First Amended Complaint, ¶¶ 10C, 20. Plaintiff-Appellee's Appendix (hereafter "PTD App") 21b, 24b.) The complaint also alleged that Technisand and the DEQ were in violation of MEPA because the proposed mining would destroy a unique, irreplaceable and fragile natural resource of the State. (First Amended Complaint ¶¶ 10A,B. PTD App 21b.)

The Nadeau Site Expansion is an area of 126.5 acres immediately west of the Nadeau Site, a previously-permitted mining area containing 23 acres. See Map, PTD App 1b. Technisand purchased the property on July 31, 1991, from Manley Brothers of Indiana, as part of Technisand's acquisition of all the Michigan assets of Manley Brothers. PTD App 30b. At the time of the purchase, Manley Brothers held a permit that only allowed mining of the 23-acre Nadeau Site, which contains no critical dune. That permit was reissued to Technisand on July 28, 1992. PTD App 2b.

In 1994 Technisand applied to the Department of Natural Resources for a permit to mine the area known as the Nadeau Site Expansion (or Taube Road Expansion). The Department rejected the application, explaining that the request must be in the form of an application to amend the existing permit, to insure that an operator does not evade the cell-unit restrictions by obtaining different permits on the acreage it holds. Letter of Reszka to Clements, 5/18/94, PTD App 4b. Thereafter Technisand submitted an application for an amended permit to add the Nadeau Site Expansion to the Nadeau Site permit. The plan for which permission was sought proposed removal of approximately 7,950,000 tons of industrial sand, as compared with the 50,000 tons authorized for removal under the existing permit. PTD App 16b. On April 20, 1995 the Department rejected the application, on the ground that the Attorney General's office had advised the Department that because the change of ownership of the property occurred after July 5, 1989 Technisand was not eligible for the exception under Section 2b of (what is now) §63702. The letter from the Department concluded: "You may withdraw the amendment application and resubmit [it] with the Critical Dunes removed from the mining portion of the amendment or we can formally deny the application as filed." Letter of Whitener to Clements, 5/20/95, PTD App 8b.

There was no further formal communication between Technisand and the Department on the matter until nearly a year later. On April 1, 1996, the Department of Environmental Quality wrote to Technisand, noting that Technisand had not indicated "what you would like to do." The letter continued (PTD App 10b):

> Since April of 1995 there have been many changes in state government and the DNR/DEQ in particular. Some of these changes coupled with additional information that Technisand has apparently supplied to the Michigan Attorney General's Office are instrumental in the GSD's ability to proceed with the review of your amendment request.

The letter noted certain matters that should be addressed by Technisand in order for the proposal to proceed. Thereafter Technisand submitted a revised application. Its environmental impact statement stated that "a large percentage of the critical dune will be removed, forever changing the most dominant physical attribute of the site." PTD App 14b. The amended permit adding the Nadeau Site Expansion was issued on November 25, 1996. DEQ App 63a.

In the trial court, the defendants moved for summary disposition on plaintiff's claim based on the invalidity of the permit on the ground that it was time barred. Judge Peterson, the judge then presiding over the case, denied the motions, ruling that the action was not an administrative review action and that there was no statute of limitations. After certain discovery, plaintiff moved for summary disposition in its favor based on the invalidity of the permit. Judge Schofield, who had succeeded Judge Peterson in the case, denied plaintiff's motion, ruling that the action was time-barred because it was filed more than 60 days after issuance of the permit and, in the alternative, that Technisand qualified for the permit under subsection (b) of § 63702. He also held, however, that plaintiff had stated a prima facie case that the defendants' actions created a threat of impairment or destruction of a natural resource. After plaintiff's application for leave to appeal to the Court of Appeals was denied, the case went to trial before Judge Maloney. Judge Maloney concluded, on the basis of the evidence at trial, that plaintiffs had

established a prima facie case of impairment or destruction but that defendants had successfully rebutted that case and that "any adverse impact on natural resources will not rise to the level of impairment or destruction of natural resources within the meaning of MEPA." Judgment of no cause of action was awarded to the defendants.

The Court of Appeals reversed. 253 Mich App 263; 655 NW2d 263. The court held that the prohibition expressed in § 63702 of the Sand Dune Mining Act was the environmental standard applicable under MEPA, that the plaintiff was not required to challenge the validity of the permit in an administrative review proceeding, and that the issue of the validity of the permit was not time-barred. It further held that Technisand was ineligible for a permit to mine a critical dune area under either subsection (a) or subsection (b) of § 63702. Finally, since there were no disputed facts bearing on the validity of the permit, the court ruled that plaintiff was entitled to judgment as a matter of law that the permit was invalid, and it remanded for entry of an order granting summary disposition in favor of plaintiff.

STANDARD OF REVIEW

Plaintiff-appellee agrees with the defendants-appellants that the issues presented by this appeal are all issues of law that are subject to *de novo* review by this Court.

ARGUMENT

PART I. RESPONSE TO D.E.Q.'S BRIEF.

I. Section 63702 of the Sand Dune Mining Act is Enforceable in this MEPA Action.

The DEQ's arguments raise the question whether a statutory prohibition that is part of Michigan's Natural Resources and Environmental Protection Act ("NREPA"), MCL Chapter 324, is enforceable through the Michigan Environmental Protection Act, commonly known as MEPA, which is itself part of NREPA (namely, Part 17 of Article I of Chapter 324). The DEQ's

position appears to be that MEPA may not be used to enforce such a prohibition and, by necessary implication, that the prohibition is not judicially enforceable at all.

The DEQ's arguments for such an unlikely conclusion are tortuous and require patience to unravel, but none of the arguments is tenable.

The substantive provisions that should dictate the outcome of this case are found in the Sand Dune Mining Act, which is Part 637 of NREPA, MCL 324.63701 *et seq.* The relevant provisions of Part 637 are as follows (we state them in logical rather than numerical sequence):

> Sec. 63704. (1) After July 1, 1977, a person or operator shall not engage in sand dune mining within the Great Lakes sand dune areas without first obtaining a permit for that purpose from the department.
>
> Sec. 63709. The department shall deny a sand dune mining permit if, upon review of the environmental impact statement, it determines that the proposed sand dune mining activity is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in those resources, as provided by part 17.
>
> Sec. 63702. (1) Notwithstanding any other provision of this part, the department shall not issue a sand dune mining permit within a critical dune area as defined in part 353 after July 5, 1989, except under either of the following circumstances: (a) the operator seeks to renew or amend a sand dune mining permit that was issued prior to July 5, 1989 . . . . (b) The operator . . .is seeking to amend the mining permit to include land that is adjacent to property the operator is permitted to mine, and prior to July 5, 1989 the operator owned the land . . . for which the operator seeks an amended permit.

The DEQ apparently no longer contends that the permit it granted to Technisand can be justified under either of the two exceptions in § 63702. Its brief makes no attempt to support the permit under either part of § 63702. Instead, the DEQ's present position appears to be that § 63702 does not limit the DEQ's discretion under § 63709, and that even though an applicant does not qualify under § 63702, the DEQ may nevertheless issue a permit if in its judgment the proposed mining is not "likely to pollute, impair, or destroy the air, water or other natural resources" of the State. It also takes the position that the prohibition expressed in § 63702 may

not be enforced in an action under MEPA. How the prohibition may be enforced the DEQ does not explain. So far as its brief goes, the DEQ appears to believe that the prohibition is unenforceable if the DEQ chooses to ignore it

A. The common-law authority conferred by MEPA does not permit courts to disregard the Legislature's mandates.

In part I,B of its brief (pp 7-10), the DEQ asserts that this Court's *Nemeth* decision (*Nemeth v Abonmarche Development, Inc,* 457 Mich 16; 576 NW2d 641 (1998)) directed the courts to develop a common law of environmental quality. (DEQ Br 7.) It does not follow, however, as the DEQ implies, that the Court meant that courts should ignore the Legislature's commands. On the contrary, this Court said that "the development of the common law in this area does not preclude the Legislature or the DNR from further entering the area of environmental law." 457 Mich at 30; 576 NW2d at 648. And the Court endorsed the statement of the United States Court of Appeals for the Sixth Circuit that MEPA authorizes a court to specify a new or different pollution control standard "if the agency's standard *falls short* of the substantive requirements of MEPA." *Her Majesty the Queen v Detroit,* 874 F2d 332, 337 (CA 6, 1989) (emphasis added.) (That statement echoes the language of MEPA itself, which states that "If a court finds a standard to be *deficient*" it may direct the adoption of a standard specified by the court. § 1701(2)(b) (emphasis added).)

Nothing in the *Nemeth* opinion suggests that the "common law" to be developed under MEPA can displace a standard prescribed by the Legislature by substituting a *lower* standard – i.e. one *less* protective of the environment or of the State's natural resources than the standard the Legislature has prescribed. The clear intent of MEPA, and of this Court's reading of the statute, was to empower courts to develop standards to protect the environment where legislative or administrative standards are "deficient," i.e. insufficiently protective of the environment or

nonexistent. It would be a perversion of the purposes of MEPA to read it as authorizing the courts to *increase* pollution or *increase* the impairment of the State's natural resources by disregarding legislative restrictions or prohibitions. The *Nemeth* opinion cannot plausibly be read as contemplating such a use of the "common law" authority conferred by MEPA.

B. The Sand Dune Mining Act does not exclude § 324.63702 from the standards enforceable under MEPA.

In part I,C of its brief the DEQ asserts that the statutory provisions applicable in this case "will not allow" adoption of "all" of Part 637 as a MEPA standard. DEQ Br 10. Its contention seems to be that because one section, § 63709, directs the DEQ to use a standard for denying sand dune mining permits that is identical with the language of MEPA ("likely to pollute, impair, or destroy the air, water, or other natural resources"), another section, § 63702, which restricts permits for mining in critical dune areas, cannot also be a standard enforceable under MEPA.

The argument is a *non sequitur.* Section 63702 is as much a part of the standards prescribed by the Sand Dune Mining Act as § 63709. The two provisions are entirely harmonious. Section 63702 says the department shall not issue a permit for mining in a critical dune area unless the applicant qualifies under one of two exceptions. Section 63709 says the department shall *deny* a permit [for *any* proposed sand dune mining] if the mining is likely to "pollute, impair or destroy, etc." In other words, even if an applicant qualifies for one of the exceptions in § 63702, it may be denied a permit under § 63709, and an applicant who does not need to qualify under § 63702 (because the mining is not in a critical dune area) may nevertheless be denied a permit under § 63709. And even if an applicant would be granted a permit under § 63709 if it stood alone, the applicant must be denied a permit if § 63702 applies and the applicant does not fit one of the exceptions.

The two sections would be perfectly harmonious even if § 63702 made no reference to any other provision, because there would be no inconsistency in applying both sections. But the Legislature has left no room for doubt. Section 63702 begins with the phrase "Notwithstanding any other provision of this part." "This part" includes § 63709, because both sections are in the same "Part," Part 637. It could not be plainer that § 63709 is subordinate to § 63702 and has no function to perform when a permit is precluded by the terms of § 63702.

(The DEQ repeatedly treats § 63709 as if it said that the department shall or may *grant* a permit if it determines that the proposed mining will *not* pollute, impair, etc. But that is not what § 63709 says. It says the department shall *deny* a permit if the mining *will* ("is likely to") pollute, impair, etc. Thus there is no potential conflict between § 63702 and § 63709 even if § 63702 did not contain the "notwithstanding" phrase. Both sections set forth reasons for denying a requested permit, and they operate cumulatively, not in contradiction of one another.)

This Court's reasoning in *Nemeth* that required applying the requirements of the Soil Erosion and Sedimentation Control Act ("SESCA") in a suit under MEPA applies fully to the requirements of the Sand Dune Mining Act. Both Acts are parts of NREPA, as is MEPA. The purpose of the Sand Dune Mining Act is to protect the State's natural resources just as obviously as is the case with SESCA. And if there is any provision of the Sand Dune Mining Act that must be applied in a MEPA action – as the DEQ apparently concedes must be true – there is no discernible reason why § 63702 should be excluded. That section is fully as much a provision for the protection of natural resources (the critical dune areas) as is the rest of the Sand Dune Mining Act.

The DEQ says that because § 63709 requires the DEQ to apply a standard that is also expressed in MEPA, "it no longer makes sense to look elsewhere in the SDMA" for MEPA

standards. (DEQ Br 11.) The DEQ does not explain why it "makes no sense." The "sense" it makes is that § 63702 prescribes a different, and stricter, standard for a specified subset of natural resources, the critical dune areas. What makes no sense is to suggest that the Legislature intended that the § 63709 standard was to wipe out the stricter § 63702 standard.

The DEQ's suggestion is made even more perplexing by its discussion of, and emphasis upon, the word "notwithstanding" in § 63702. The DEQ's "makes no sense" assertion is coupled with the observation, "particularly not to § 63702, which applies 'notwithstanding' what may be authorized by the provisions of part 17, MEPA." (The latter reference is DEQ's error. The "notwithstanding" in § 63702 refers to "this part" - i.e. the Sand Dune Mining Act – and not to "part 17, MEPA.")

It is wholly unclear how the DEQ thinks the "notwithstanding" clause in § 63702 supports its theory that § 63709 displaces § 63702, when it so plainly does the opposite. And, indeed, the brief appears to turn back on itself and make exactly the opposite point in the pages following its "particularly not to § 63702" argument on page 11 of the brief. Thus at page 13, after noting that the term "notwithstanding" cannot be regarded as mere surplusage, the brief states that the term in § 63702 "indicates that the requirements of § 63702 are to control the department's permitting decisions, even when it is determined . . . that MEPA, as a distinct provision, can be satisfied.." This statement emphatically supports plaintiff's position, not the DEQ's. Again, at the bottom of page 14 the brief states that the term "notwithstanding" in § 63702 "indicates that even if mining is not restricted by MEPA under § 63709, § 63702 may still control the department's issuance of a permit; the department cannot issue a permit unless the applicant meets its additional restrictions." This statement too supports plaintiff's position, not

the DEQ's. The same is true of the concluding observation in this part of the DEQ's brief (p. 15) stating that the considerations in § 63709 are "subordinate to the considerations of § 63702."

In the face of those clearly correct and necessary concessions, it is a mystery how the DEQ can say in the same passage that the court of appeals "ignore[d] this legislative ordering" in the statement the DEQ quotes near the top of page 15. Far from ignoring the legislative ordering, the court of appeals accurately stated that "If MCL 324.63702 is not satisfied, then mining in a critical dune area is prohibited, and further analysis of MCL 324.63704 and MCL 324.63709 is unnecessary." 253 Mich App at 273; 655 NW2d at 278-79. The Court of Appeals' statement concisely summarizes the Legislature's manifest intent and expresses the essence of this case.

The DEQ attempts to support its position that § 63702 is not a standard for purposes of MEPA, by describing § 63702 as an "eligibility" requirement (DEQ Br 10) and referring to it as "independent" of the requirements of MEPA (id at 13) and "separate from" § 63709 (id at 14).

Such labels, whatever they may mean, do not help the DEQ's position.

By calling § 63702 an "eligibility" requirement the DEQ perhaps means to suggest that it is not an environmental-protection requirement Clearly, however, that is exactly what the section is. By narrowly limiting the category of persons "eligible" to engage in mining critical dunes, the Legislature is preventing destruction of critical dunes that could otherwise occur. "Eligibility" in this context is what determines whether the destructive "activity" will take place at all. Both the DEQ and, even more explicitly, Technisand, have argued as if the only question raised by § 63702 is whether Technisand or someone else will be able to mine the critical dune in question. That is false. If Technisand is not "eligible" – as it plainly is not under the terms of § 63702 – no one will be able to mine this critical dune, because any successor to Technisand

will also have acquired the property after July 1, 1989. Thus § 63702 is just as much an "environmental protection" standard as § 63709, but a much stricter one.

It is not apparent what the DEQ believes should follow from calling § 63702 a "separate" or "independent" requirement. It clearly is a distinct requirement, but that is no reason for concluding that it is not enforceable in an action under MEPA. Neither MEPA nor the Sand Dune Mining Act can be read as saying that the *only* requirement of the Sand Dune Mining Act that may be enforced by a court in a MEPA action is § 63709.

C. Section 63702 is an environmental standard within the meaning of MEPA.

In part I,D of its brief (p 15 *et seq.*), the DEQ argues that the court of appeals altered the meaning of § 1701(2) of MEPA by disregarding the fact that the word "procedure" in that subsection is modified by the word "antipollution." The DEQ also argues that this Court in its *Nemeth* decision found that SESCA provided the applicable MEPA standard only because the soil-erosion controls involved in that case dealt with a form of "pollution."

The Court of Appeals found that § 63702 provided the appropriate "standard or procedure" because it relates to protecting the environment and natural resources from "pollution, impairment or destruction." It noted that this Court's opinion in *Nemeth* did not seem to find the element of "pollution" in the case to be an important point, since the opinion emphasized SESCA's purpose to "protect soil" as much as it did the element of water pollution. See 253 Mich App at 286-287 n2; 655 NW2d at 277 and n2, and 457 Mich at 28; 576 NW2d at 647. Further support for the Court of Appeals understanding of *Nemeth* is that this Court's discussion repeatedly spoke of "pollution, impairment or destruction" as the test of a MEPA violation and in at least one instance spoke of "pollution control" in quotation marks. Certainly the *Nemeth* opinion did not differentiate between "pollution" and the other forms of environmental degradation in directing courts to determine the appropriate standards to apply.

In view of the fact that MEPA so clearly applies to "impairment and destruction of natural resources" as fully as to pollution, it is not clear why subsection (2) of § 1701 speaks only of "pollution" standards and "antipollution" devices and procedures. The explanation might be that when MEPA was enacted in 1970 the problem of pollution was the environmental hazard uppermost in the minds of the lawmakers, and they wished to leave no doubt that they wanted the courts to have the somewhat unusual power of prescribing pollution standards, in order to keep pace with the then rapidly developing technology and knowledge concerning pollution. It seems most unlikely that they meant to *exclude* the application of standards or requirements affecting "impairment or destruction" but not pollution.

What is undeniable, however, is that MEPA itself is not confined to protecting the environment only against pollution, as subsection (1) of § 1701 makes completely clear. Adopting the language of Article 4, Section 52 of the Michigan Constitution, which MEPA was intended to implement, subsection (1) provides for relief for the protection of "the air, water and *other natural resources* from pollution, *impairment or destruction.*" Subsection (2) cannot plausibly be construed as narrowing the scope of subsection (1) by removing "other natural resources" from MEPA's protection or by eliminating "impairment or destruction" of such resources as grounds for injunctive relief.

Although the DEQ refers to *Nemeth* in support of its argument, nothing in the *Nemeth* opinion provides any support for the idea that subsection (2) removes from MEPA the protection of natural resources against impairment or destruction, or for the idea that MEPA is concerned only with pollution. This Court's own decision in the *WMEAC* case (*West Michigan Environmental Action Council v Natural Resources Comm'n,* 405 Mich 741; 275 NW2d 538 (1979)) demonstrates that MEPA is not so limited. That case applied MEPA for the protection

of an elk herd, a natural resource, from harm to its habitat likely to result from drilling oil wells. It was not a pollution case. And the court of appeals has regularly treated nonpollution cases as within the reach of MEPA. See, *e.g., Stevens v Creek,* 121 Mich App 503, 508; 328 NW2d 672 (1982) (trees); *Michigan United Conservation Clubs v Anthony,* 90 Mich App 99; 280 NW2d 883 (1979) (fish).

Whatever the proper reach of subsection (2) of § 1701 of MEPA, not all cases that are within MEPA itself require the remedial power spelled out in subsection (2), because not all cases require that the court prescribe a standard different from an existing one.

There are two kinds of case in which no such power is needed in order to give effect to the objectives of MEPA. One is where the court is simply exercising the common-law function that this Court has held is conferred by MEPA – that is, deciding on a case by case basis whether a particular activity harms the environment to a degree exceeding the evolving standards of Michigan common law. The other type of case – exemplified by this case – is where there is an applicable substantive statute, prescribed by the Legislature and within its constitutional authority, that leaves no room for judicial discretion as to what the standard or requirement is. In cases of the latter type there is no occasion for the exercise of the authority to prescribe new standards that subsections (2)(a) and (b) of § 1701 of MEPA confer. In such cases the court can neither ignore the Legislature's command nor substitute its own view of what an appropriate standard would be. That is this case, and the broad language of subsection (1) of § 1701 covers it.

(If it were necessary to reach the question, the Court might well conclude that the equitable power of a court under subsection (1) of § 1701 includes the power to issue a mandatory injunction specifying a new standard when an existing standard is "deficient." It is

unnecessary to reach that issue in this case, however, since all that is required is for the court to enforce by a declaratory judgment or prohibitory injunction a statutory prohibition that is clearly within the Legislature's authority.)

The DEQ closes this part of its brief by repeating the assertion that § 63702 cannot be a "MEPA standard." (DEQ Br 19.) It says "the *express* provisions of Part 637, and, in particular, § 63702, *do not allow* that section to be considered as [a] MEPA standard *by its express terms.*" (Emphasis added.) The DEQ does not say what "express terms" it is referring to. There are none.

D. The court is not required to make its own determination of adverse environmental impact when the Legislature has made that determination.

In part I,E of its brief (pp 20-22), the DEQ concedes that the validity of a permit may be challenged in a MEPA action. The concession is compelled by this Court's decision in the *WMEAC* case, which squarely held exactly that. The Court also ruled emphatically that in a MEPA action the court is to give no deference to the administrative agency's determination.

The DEQ apparently contends, however, that *WMEAC* also holds that in such an action a court may overturn the agency's action *only* by making its *own* determination, supported by findings of fact, that the activity authorized by the purported permit constitutes an "impairment or destruction" of natural resources. That contention is not supported by the *WMEAC* decision.

In *WMEAC* there was no statute comparable to § 63702 of the Sand Dune Mining Act. The case was one in which the court was called upon to exercise its common-law authority under MEPA to determine whether a challenged activity threatened impairment of natural resources. So of course this Court ruled that the lower court was required to make an independent determination, based upon adequate findings of fact, that the activity did have the requisite environmental impact. But the Court had no occasion to rule on a situation where a permit has

been granted, not as an exercise of a discretion given to the agency, but in the teeth of a statute that deprives the agency of any authority to issue the permit and that flatly forbids the activity in question. In such a situation the Legislature itself has determined that the activity constitutes an impermissible impairment or destruction, and the court is not called upon to make such a determination – indeed, is forbidden by constitutional principles from making a contrary determination.

Since no such statute was involved in *WMEAC* the case does not support the DEQ's position. The same is true of the other cases cited by the DEQ in this part of its brief. None involved a situation where a legislative enactment categorically forbade the activity that was the subject of the MEPA action. The one case most nearly relevant, *Genesco, Inc v Michigan DEQ,* 250 Mich App 45; 645 NW2d 319 (2002), actually supports plaintiff's position rather than the DEQ's. That decision held that MEPA could not be used to obtain pre-enforcement review of a remedial order of the DEQ under the Michigan Environmental Response Act because of the delay such pre-enforcement review would cause. The case is therefore an illustration of the proposition, which should be self-evident, that the court in a MEPA action is bound to follow relevant substantive enactments of the Legislature. That principle means that § 63702 of the Sand Dune Mining Act must be applied in this case.

Although DEQ's brief speaks of standards for "review" of administrative action, this case involves no "review' of the DEQ's procedures or fact-finding or discretion. It involves only the question whether Technisand's permit was within the DEQ's statutory authority to grant, and clearly that is a question that was within the power of the court to determine as a wholly *de novo* matter.

Venerable authority establishes that in such circumstances a common-law court may treat a grant of property rights by an administrative entity as a nullity. The decision of the United States Supreme Court in *Burfenning v Chicago SPR & O R Co,* 163 U.S. 321 (1896), affirming a decision of the Supreme Court of Minnesota, involved a situation very analogous to the present case. The plaintiff in the case sought to enforce property rights deriving from a patent, granted by the Commissioner of the General Land Office, to certain public land. However, the statute under which the patent had been issued excluded from homesteading any lands within the corporate limits of a city. The land in question was within the limits of Minneapolis. The city was incorporated on March 8, 1881. The claimant's patent application was not initiated until March 27, 1883. The Court held the patent invalid, despite the well-established doctrine that, in general, land determinations by the land department were final. It ruled that "when by act of Congress a tract of land has been reserved from homestead . . . proceedings in the land department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law."

In this case the Michigan legislature "reserved from mining" the critical sand dune which Technisand claims to have the right to mine because of a permit issued by an administrative agency. The agency acted "in defiance" of that reservation, and its action is entitled to no deference.

It would be ironic indeed to hold that MEPA, a statute recognized as a notable and pioneering measure for enabling the courts of Michigan to protect the environment and natural resources of the State from impairment, gives the courts less authority to enforce the Michigan legislature's mandate against mining critical dunes than common-law courts possessed more than a century ago to enforce Congress's mandates regarding disposition of the public lands.

E. The Legislature did not give final authority to the DEQ to interpret § 63702.

Part I,F of the DEQ's brief is largely a repetition of arguments in other parts of the brief that have already been answered.

In a slight variant of its "eligibility" argument, the DEQ argues that § 63702 of the Sand Dune Mining Act is concerned solely with "historical factors" about who may be allowed to mine a critical dune area. It argues that such historical facts are "unrelated to the impact on the environment" because the impact of an activity "does not change because it is done by an older person or a different person." DEQ Br 23. As we have already pointed out, however, the effect of denying "grandfather" permission to an applicant such as Technisand is not that someone else will receive a permit but that no one can, because any subsequent owner to whom Technisand might transfer the property will also be disqualified. The effect of the "historical factors" is to determine whether the critical sand dune will be mined at all. The DEQ's argument is obviously fallacious.

In a variant of the argument, the DEQ goes on to say that even if the historical facts do affect whether the activity occurs at all, "this inquiry is unrelated to impact on the environment." But of course the inquiry *is* related to impact on the environment (as we have already shown) because the outcome of the inquiry determines whether the critical dune will be destroyed. To be sure, the purpose of the *exceptions* is not related to the protection of the environment. *Their* purpose is to protect expectations – the expectations of the owner who has bought in reliance on pre-existing law. But the question whether § 63702 is intended to protect the environment is determined by the purpose of the prohibition, not by the purpose of the exceptions. The DEQ's arguments merely pile fallacy upon fallacy.

Next, the DEQ argues that the Legislature could have authorized an appeal to correct errors in the department's administration of the permit requirements but did not, and therefore

the department's determination is final – "the determinations are left to the Department, subject to any available review as an administrative action." These assertions are at odds with this Court's opinion in the *WMEAC* case. The Court said that MEPA "specifically indicates that the usual standards for review of administrative actions under the Administrative Procedures Act . . . are inapplicable once an environmental protection act case has been filed in a circuit court." It added that "The environmental protection act would not accomplish its purpose if the courts were to exempt administrative agencies from the strict scrutiny which the protection of the environment demands." 405 Mich at 754; 275 NW2d at 542. The Court could hardly have indicated more plainly that decisions of an administrative agency that flout statutory prescriptions for the protection of the environment are not entitled to any deference, let alone to the complete finality for which the DEQ contends.

Finally, the DEQ argues, with great hyperbole, that if the court of appeals decision is upheld "the public" will "be unable to rely upon any agency authorization" in the environmental field, and that permit holders "will be forever threatened by the prospect that someone will identify a procedural oversight in the original administrative process." DEQ Br at 24.

The professed fear has no basis in reality. This case does not involve any "procedural oversight." It involves a conscious disregard of a substantive statute that deprived the DEQ of the authority it purported to exercise – a deficiency that no "procedure" could have cured. Nor does the case involve any justifiable "reliance" on the DEQ's action. Not only was Technisand presumed to know the law before it purchased the critical dune area, but it was expressly advised by the department when it first applied for a permit that it was not qualified for the permit it sought, and the department never tried to explain to Technisand why that decision was incorrect. So far as reliance on the permit itself is concerned, Technisand can claim none because it did not

attempt to begin mining in the critical dune area until well after the complaint in the present action was filed. Moreover, the DEQ concedes that any permit is subject to challenge under MEPA on the ground that it authorizes activity that "pollutes, impairs or destroys" the environment or natural resources, yet the DEQ does not seem to think that such a risk (more uncertain, actually, than the bright line drawn by § 63702) is an unwarranted "threat" to permit-holders.

So far as reliance by the "public" is concerned, the only effect this case might have is that if the DEQ's position is upheld the public will know that it *cannot* rely upon the DEQ to observe faithfully the Legislature's policies for protecting vital natural resources of the State, nor upon the courts to enforce such observance.

II. The Court of Appeals correctly ordered summary disposition in favor of plaintiffs. Because the material facts were undisputed, plaintiff's case under § 63702 left no basis for rebuttal by the defendants.

In parts II,B and C of its brief (pp 30-33), the DEQ argues that it was entitled to rebut the plaintiff's case by evidence offered to show that the destruction of the critical dune would *not* impair or destroy natural resources of the State.

This argument is but another form of the DEQ's contention that § 63702 is not a standard applicable in a MEPA action. If that contention is wrong – as we believe it is, for all the reasons discussed in the preceding parts of this brief – then there can be no doubt that plaintiff was entitled to summary disposition in its favor. That is because plaintiff's case was not merely a "prima facie" case but a conclusive case. Under the statutory mandate, the only facts needed for plaintiff to prevail were (1) that the mining permit being challenged was for mining in an area that has been officially designated as a critical dune area; (2) that no permit authorizing the mining of this critical dune area existed when Technisand acquired the property; and (3) that Technisand acquired the property after July 5, 1989. Those facts were undisputed. On those

facts, § 63702 flatly forbids the issuance of a permit and § 63704(1) flatly forbids the mining activity. Hence there could be no *material* issue of fact standing in the way of judgment for plaintiff as a matter of law. The facts DEQ says it was entitled to have considered were not *material* under the applicable legal rule.

Of course Technisand (or the DEQ) could have rebutted plaintiff's prima facie case if they had been able to prove that the Nadeau Site Expansion did not extend into a critical dune area, or that Technisand did not intend to mine any of the critical dune area, or that Technisand had acquired the property before July 5, 1989. But no such proof was offered, because the pertinent facts were undisputed.

The DEQ's argument relies on the language of § 1703(1) of MEPA. That section says in part that when a plaintiff has made a prima facie case "that the conduct of the defendant . . . is likely to pollute, impair, etc.," the defendant may rebut "the prima facie showing" by submitting evidence to the contrary. But that is not the kind of case plaintiff relied on for summary disposition. Plaintiff's case did not depend on showing that defendant's conduct was "likely to pollute, etc.," but simply on showing that the conduct was a "violation" of a statute that itself specifies that such conduct impermissibly impairs or destroys natural resources. Section 1701(1) expressly provides a remedy for such a violation, and the finding of a violation in such a case does not invoke the court's common law authority to determine what conduct unduly pollutes or unduly impairs natural resources. Accordingly in such a case there is no "prima facie case" of the kind referred to in § 1703(1) and § 1703(1) does not come into play, except for its final sentence. That sentence provides that "Except as to the affirmative defense, the principles of burden of proof and weight of the evidence generally applicable in civil actions in the circuit

courts apply to actions brought under this part." Under those principles Preserve the Dunes was entitled to summary disposition in its favor.

The DEQ's own argument implicitly acknowledges that the first part of § 1703(1) applies only when a "prima facie case" is based on the court's role in developing a common law of environmental quality, because its argument refuses to recognize any other kind of MEPA case. The DEQ insists that the court must *always* exercise its common-law role in deciding a MEPA case. (DEQ Br 27.) As pointed out earlier in this brief, however, this Court's *Nemeth* decision by no means foreclosed the Legislature's determination of the standards or requirements applicable in a MEPA action, and indicated quite explicitly that the newly-conferred power to develop a common law of environmental quality did not mean that the courts could substitute *weaker* or *less protective* standards than those prescribed by the Legislature.

If the Court were to accept the DEQ's contention, and allow "rebuttal" of an indisputable violation of § 63702, it would be the equivalent of a holding that § 63702 is unenforceable. The language of MEPA does not require such a result.

Nor do this Court's decisions require such a result. Neither the *WMEAC* case nor the *Nemeth* case involved the enforcement of a statutory standard like § 63702. *WMEAC* was an exercise of the courts' common law power to make environmental determinations, and did not involve any specific standard prescribed by the legislature or any administrative authority. The *Nemeth* opinion made clear that a violation of the *standard involved in that case* was not "the end of the inquiry," because the defendants had had the opportunity to rebut the *prima facie* case based on the particular violation. (The trial court had apparently already found against defendant on its attempt to rebut, and this Court reinstated the trial court's judgment.)

But the standard on which the Court based the *prima facie* case in *Nemeth* was very different from § 63702.

Under the SESCA statute and the applicable rules of the Department, a landowner or developer intending to make an "earth change" within a prescribed distance from a lake or stream was required to obtain a permit from the appropriate enforcing agency. The defendant in *Nemeth* had not done so, and this Court held that its violation of the applicable rules was a *prima facie* violation of MEPA. Violation of the SESCA rule in question, however, clearly did not of itself require entry of judgment for the plaintiff. The statute did not forbid the defendant from receiving the needed permit or forbid an enforcing agency from granting one. So far as appears, the defendant could readily have obtained the required permit had it followed the prescribed procedure. The Court emphasized how far the fact of a violation was from establishing the required effect on natural resources, pointing out that it could be argued that MEPA is violated "any time someone puts a shovel in the ground within five hundred feet of a lake or stream." 457 Mich at 36 n 10; 576 NW2d at 651 n 10. And the Court noted that the rebuttal and affirmative defense provisions of MEPA "address such frivolous claims."

In sharp contrast to the kind of violation involved in *Nemeth,* § 63702 of the Sand Dune Mining Act forbids entirely an activity that the Legislature itself has determined to be an impermissible impairment of the State's natural resources. Neither the holding of *Nemeth* nor any language in the opinion precludes finding that a violation of § 63702 is a conclusive violation of MEPA.

In view of the undisputed facts of the case, the judgment required is no different than if Technisand had proceeded to mine the critical dune area without even asking for a permit. Suppose it had done so, and plaintiff had brought a MEPA action to enjoin the mining as being

in violation of § 63704(1) of the Sand Dune Mining Act. Would Technisand be entitled to defend by offering evidence that the mining was not an "impairment or destruction" of a natural resource? We submit that the answer to the question must clearly be "No." Suppose further that in such an action plaintiff had established beyond dispute that Technisand could not lawfully have received a permit even if it had applied for one. Would Technisand be entitled to defend by offering evidence that the mining was not an "impairment or destruction" of a natural resource? Again, we submit, the answer must be "No," and the plaintiff would be entitled to a permanent injunction as a matter of law. The present case is no different, except that Technisand holds a piece of paper called a permit that is as clearly without any lawful basis as the land patent involved in the United States Supreme Court's decision in the *Burfenning* case, *supra* .

Reconciling § 63702 and the "prima facie" language of § 1703(1) of MEPA is not difficult, for the reasons we have explained. As this Court observed in *Huggett v Dept of Natural Resources*, 464 Mich 711, 717; 629 NW2d 915, 919 (2001), in determining whether certain wetland activities were exempt from permit requirements, "we must construe both the prohibitions and exemptions in part 303 to make both viable. . . . If the statutory language is clear and unambiguous, then we conclude that the Legislature intended the meaning it clearly and unambiguously expressed, and the statute is enforced as written. No further judicial construction is necessary or permitted." The language of § 63702 forbidding mining that is not within one of the two stated exceptions could not be clearer or more unambiguous. It should be "enforced as written."

PART II. RESPONSE TO TECHNISAND'S BRIEF.

Despite the multiplicity of headings in its brief, Technisand's arguments for reversal of the Court of Appeals' decision reduce essentially to two propositions. First, that a plaintiff is not permitted to challenge the validity of a permit in a MEPA action; and second, that Technisand

qualified under *both* of the exceptions in § 63702 of the Sand Dune Mining Act (rather than *neither,* as the Court of Appeals ruled). The first contention is contrary to this Court's decision in the *WMEAC* case. The second contention is squarely contrary to the clear language of the statute, as well as to its obvious purpose

I. The validity of Technisand's permit is properly at issue in this MEPA action.

This Court's decision in the *WMEAC* case clearly authorizes the use of MEPA to challenge the validity of a permit. In that MEPA action the plaintiff sought to prevent the drilling of oil wells pursuant to permits granted by the DNR. The Court held that the validity of the permits was properly at issue in the case. It held that the issuance of the permits would result in impermissible damage to the State's natural resources and it permanently enjoined drilling pursuant to the permits. This case is precisely parallel, except that in view of the legislative standard embodied in § 63702 there is no need for the court to make its own determination as to whether the environmental effect is one that is forbidden.

Although the plaintiff in *WMEAC* had made an unsuccessful effort to intervene at the administrative level, there was no suggestion in the Court's opinion that the intervention was necessary or was a necessary predicate for the MEPA challenge to the permits. To the contrary, the Court emphasized that the MEPA action was not a "judicial review" of an administrative proceeding but was a "direct" judicial inquiry, as reflected in the statement of MEPA's sponsor that "under the new statute, courts may inquire directly into the merits of environmental controversies, rather than concern themselves merely with reforming procedures or with invalidating arbitrary or capricious conduct." *WMEAC,* 405 Mich 741, 754; 275 NW2d 538, 542. The point was also emphasized in the separate opinion of three members of the Court, which noted that "The usual standards for review of administrative action under the

Administrative Procedures Act are not applicable" and then quoted from a lower-court opinion a passage that applies with special force to the present case:

> [T]o rule that the reviewing court is bound by the administrative fact finding would be but to destroy one of the central thrusts and purposes of [MEPA] – to watchdog the controlling governing agencies themselves in order to guarantee that they do not by inadvertence become the captives of the very entities they are seeking to control and/or fail to recognize, due to ingrained myopia, inertia, and bureaucratic complacence, the very environmental dangers they were established to prevent. 405 Mich at 764; 275 NW2d at 547.

Technisand argues that the *WMEAC* decision is inapplicable here because the MEPA complaint in that case was filed before the permits were actually granted and therefore "[J]udicial review of administrative action was timely." Tech. Br 19 (Technisand's brief erroneously refers to *Nemeth* at this point but the reference is clearly intended to be to *WMEAC*). There is nothing in the *WMEAC* opinion, however, to suggest that that fact was relevant in any way, and the Court's insistence that the case was *not* a "judicial review" proceeding shows that the timing was not relevant. On the Court's rationale, it would have made no difference if the plaintiff had waited until after the permits were granted and then brought the MEPA action. (Indeed, the Court treated the case as if the complaint had been amended to reflect that sequence. See 405 Mich at 751; 275 NW2d at 541.)

Compounding its mischaracterization of the *WMEAC* case, Technisand apparently contends that the only way Preserve the Dunes could have judicially challenged Technisand's permit (other than by a MEPA action brought *before* the issuance of the permit!) was by a petition for review under the Administrative Procedures Act, and since such a petition must be filed within 60 days of the agency's order, Preserve the Dunes' challenge to the permit was "untimely." See Tech. Br 13, 16-17. There are numerous flaws in Technisand's argument.

First, this Court's opinion in *WMEAC* quite carefully explained the relationship between a MEPA action and the APA, and made clear that resort by a MEPA plaintiff to the APA was

unnecessary. The relationship, the Court explained, is set forth in MEPA itself (MCL § 691.1204, now § 324.1704), which does not *require* resort to the APA but *permits* the MEPA court, if it chooses to do so, to "remit the parties to" administrative proceedings under the APA and then to review such further proceedings without regard to the judicial review provisions of the APA. 405 Mich at 753-753; 275 NW2d at 541-42. Neither the DEQ nor Technisand ever requested the circuit court to refer this case to the DEQ for further proceedings. The separate opinion in the *WMEAC* case was equally categorical in denying the relevance of the APA. It said, "The usual standards for review of administrative actions under the Administrative Procedures Act are not applicable." 405 Mich at 763-764; 275 NW2d at 546-47.

Second, the Administrative Procedures Act is inapplicable to this case by its own terms. It provides for judicial review only in cases where a person "is aggrieved by a final decision or order in a *contested case.*" § 101, MCL 24.301 (emphasis added). *13-Souhfield Associates v Dep't of Public Health,* 82 Mich App 678, 685; 267 NW2d 483 (1978); *Kelly Downs, Inc v Racing Commission,* 60 Mich App 539, 547; 231 NW2d 443 (1975). The permit issued to Technisand was not issued in a contested case.

Third, even if the Administrative Procedures Act could otherwise apply, its limited period for judicial review never became operative. Section 104(1) of the Act (MCL 24.304) provides: "A petition shall be filed in the court within 60 days after the mailing of a notice of the final decision or order of the agency . . ." This language plainly contemplates that such a notice must be mailed to the person alleged to have a right to judicial review under the statute, presumably a person who was a party to the "contested case" that § 101 of the APA requires. In the absence of such a notice the 60-day period does not begin to run. The record in this case does not reveal that any such notice was ever mailed to Preserve the Dunes or to anyone

authorized to act on its behalf. (Of course there was no such person, since Preserve the Dunes did not come into existence until more than a year after the DEQ issued the permit. Technisand argues that one or more persons who later became members of Preserve the Dunes was present at a public hearing on the application for a permit, but there is no evidence that the required notice was mailed to any such person. Even if such a notice had been mailed to such a person, it would not have bound Preserve the Dunes.)

For all the above reasons, plaintiff was clearly not barred by the Administrative Procedures Act from challenging the validity of Technisand's license in this MEPA action. Technisand makes the further suggestion, in a footnote (Tech. Br 14 n 5), that plaintiff may have been barred by the 21-day period for judicial review applicable to MCL 600.631. But all of the reasons given by this Court in the *WMEAC* case for not requiring a MEPA plaintiff to seek "judicial review" in the ordinary sense apply with equal force to § 600.631. Moreover, § 600.631 by its own terms is not a required avenue of relief. It merely provides a residual remedy for review of orders "from which an appeal or other judicial review has not otherwise been provided for by law." The Administrative Procedures Act, enacted subsequent to § 600.631, has "otherwise provided" for review of orders of the DEQ following a contested case, even though for the reasons already given such review was not available to plaintiff in this particular case. In any event MEPA itself is a means "otherwise provided by law" that this Court has determined in *WMEAC is* available for the type of "judicial review" required in this case. Thus § 600.631 does not apply, and Preserve the Dunes, which did not even exist within the 21-day period allowed for judicial review under § 600.631, is not barred by that section any more than it is barred by the APA.

Technisand's arguments, if accepted, would drastically curtail the effectiveness of MEPA, contrary to the Legislature's broad purpose identified by this Court in *Eyde v Michigan*, 393 Mich 453, 454; 225 NW2d 1 (1975), in which the Court said:

> The EPA is significant legislation which gives the private citizen a sizable share of the initiative for environmental law enforcement. The act creates an independent cause of action, granting standing to private individuals to maintain actions in the Circuit Court for declaratory and other relief against anyone for the protection of Michigan's environment.

In that case the Court ruled that plaintiffs were entitled to an injunction barring sewer construction that adversely affected the environment, notwithstanding the fact that the issues could have been raised in a previous condemnation proceeding. The Court said: "There is no statutory duty that requires citizens to intervene in condemnation proceedings to assert their rights under the EPA or be barred forever from raising them."

That holding provides a complete answer to Technisand's "timeliness" argument. There is no statutory duty that requires citizens to intervene in the DEQ's proceedings, or seek "judicial review" of those proceedings, in order to assert their rights under MEPA or be barred forever from asserting them.

Repeating another theme that weaves through Technisand's "timeliness" arguments, its brief states that "The statute directs the court to adjudicate the impact of the defendant's *conduct*, not the legal niceties of the permitting process." Tech. Br 17 (emphasis is Technisand's). The statement epitomizes the hollowness of Technisand's position. First, this entire case clearly is concerned with "conduct" – the destruction of a critical sand dune by an entity that a statute forbids to engage in such conduct. And second, the case has nothing to do with "legal niceties" of a "process" – it concerns the total absence of legal authority in the DEQ to do what it has done. Technisand adds that the DEQ's determination "is, of course, entitled to a presumption of regularity." Ibid. If anything is clear from the *WMEAC* opinion it is that the DEQ's

determination is *not* entitled to such a presumption. "Presumption" is irrelevant, however; the question in this case is solely one of law (given the undisputed facts concerning Technisand's ownership) and is for this Court's determination.

II. Technisand was not entitled to a permit under either of § 63702's exceptions.

In the Court of Appeals the DEQ contended that Technisand's permit came within the exception in subsection (a) of § 63702; it did not attempt to defend the permit under subsection (b). (Recall that the Department, on advice of the Attorney General, had originally advised Technisand that it was not entitled to a permit because it did not own the property before July 5, 1989.) Technisand, on the other hand, contended that it was entitled to the permit under subsection (b), and gave only perfunctory support to the DEQ's argument based on subsection (a). The Court of Appeals ruled against both contentions. In this Court the DEQ makes no argument in support of either position. It has apparently abandoned any effort to justify its award of the permit on the basis of § 63702, and contends only that the court cannot enforce § 63702. Technisand, on the other hand, now seems to base its argument primarily on subsection (a) (Tech. Br 25-30), although it renews its arguments in favor of subsection (b) as well (Tech. Br 30-40).

The defendants' uncertainty as to where to take a stand is not surprising. The truth is that the language of the statute makes clear that neither exception applies, as the Court of Appeals held.

A. Subsection (a) does not apply.

Section 63702(1) provides that the department "shall not issue a sand dune mining permit within a critical dune area . . . after July 5, 1989" except under the circumstances defined in subsection (a) or (b). The two subsections must be read together. Subsection (a) applies when the operator seeks to "renew or amend" a permit issued before July 5, 1989. Subsection (b)

applies when the operator holds a permit and is seeking to amend the permit "to include land that is adjacent to property the operator is permitted to mine" and the operator owned "the land . . . for which the operator seeks an amended permit" prior to July 5, 1989.

Plainly, the "renew or amend" language in subsection (a) does not include amendments that seek to include additional land in a critical dune area. If it did, subsection (b) would serve no purpose. It would be swallowed up in subsection (a), and there would be *no* limitation, in time or space, to the department's power to enlarge existing permits so as to include critical dunes. Obviously that cannot have been the Legislature's intention, since the whole purpose of § 63702 was to bring an end to the mining of critical dunes.

Subsection (a) must therefore be taken to refer to permits issued before July 5, 1989 that *already permitted mining within a critical dune area.* Such mining could continue under such permits, and the permits could be amended in ways other than adding property in a critical dune area. But if the applicant wanted to enlarge the permit by extending the permitted mining to a critical dune area, subsection (b) must be satisfied. In effect., subsection (b) carves out of subsection (a) the kind of amendment described in subsection (b), as if subsection (b) were preceded by the words "provided, however." This is the natural reading of the two subsections in relation to each other and is the only reading that allows both subsections to stand. Any other reading of subsection (a) is the equivalent of striking subsection (b) from the statute.

Technisand tries to bring itself within subsection (a) by describing the Taube Road Expansion as having been "already under" or "*always* within" or "already encompassed by" or "already covered by" the permit that Technisand acquired from its predecessor, Manley Brothers. Tech. Br 26, 27, 28, 29. But Technisand's use of such terms is misleading, to say the least. To the extent that the terms are accurate, they refer only to the department's policy of treating a

permittee's entire contiguous ownership as a single unit for purposes of the statutory restriction on the number of "cell-units" that may be mined at one time (see § 63706), so that an operator cannot increase the number of allowable cell units by dividing his contiguous property into separate permits. (The policy is explained in an affidavit of a DEQ official (DEQ App 36a, ¶ 9) and in a letter sent by the department to Technisand when Technisand first applied for a permit. See letter of Reszka to Clements, 5/18/94. PTD App 4b.) The policy did *not* mean that Technisand's predecessor was *permitted to mine* the Taube Road Expansion, as the letter to Technisand just cited made completely clear. Had the policy meant that, there would never have been a need for Technisand to apply for an amended permit in the first place. (The permit that Technisand acquired from its predecessor expressly stated that the "Permitted Activity" was the removal of sand from the "Nadeau Site," which did not include the property in the Nadeau Site Expansion. See PTD App 2b.)

Technisand's argument is the same argument the DEQ made in the Court of Appeals (but which the DEQ does not repeat in this Court). The Court of Appeals not only rejected the argument but called it "disingenuous." 253 MichApp at 306; 655 NW2d at 286. It is no less so coming from Technisand than it was from the DEQ.

Technisand asserts that the Court of Appeals' interpretation of subsection (a) is "absurd," apparently because Technisand believes that "the only reason to amend a permit pursuant to subsection (a) is to allow mining in a critical dune area where the permit does not already allow mining." Tech. Br 29. But it is Technisand's statement that is nonsensical. Amendment of a permit would be needed to add a *noncritical* area as well, just as would have been the case if Technisand had followed the department's 1995 advice (PTD App 8b) to resubmit its application

"with the Critical Dunes removed from the mining portion of the amendment." Such an amendment would properly have come within subsection (a).

B. Technisand was not eligible under Subsection(b).

Subsection (b) allows permits to be amended to include a new critical dune area, but only if (l) the area is adjacent to property the operator [applicant] is already permitted to mine and (2) the operator owned the land for which the amended permit is sought prior July 5, 1989. Technisand's application satisfied the first condition but not the second.

The language of the statute is clear and unambiguous. It is also clear from the language what the legislative purpose was. By adopting the prohibition in § 63702 the Legislature sought to bring a halt to any new mining of critical dune areas. There were, however, existing landowners who might have purchased critical-dune property in reliance on the fact that the law as of the time of their purchase allowed such mining. The most likely group of such purchasers would have been those who had bought property adjacent to an existing mining operation. Hence the Legislature chose to exempt such owners from the prohibition. Since the new prohibition took effect on July 5, 1989, only purchasers prior to that date could have claimed reliance on the pre-existing law. Subsequent purchasers would take with notice of the prohibition and could claim no hardship. There was no need to give them any "grandfather" exemption.

The prohibition enacted by the Legislature in 1989 had been in effect a full two years before Technisand's owners made their investment. They must be assumed to have bought the property with full awareness of the prohibition of new mining in critical dune areas and of the fact that the exception by its terms did not apply to Technisand. As Technisand's vice-president of operations admitted, Technisand bought the property "with its eyes wide open as to legal

implications." Fodo trial testimony, PTD App 37b. Since Technisand could not have relied on prior law, it comes within neither the letter nor the purpose of § 63702's exceptions.

The DNR had no difficulty on concluding that Technisand was ineligible for the permit when Technisand applied to it for an amended permit adding the Nadeau Site Expansion. It told Technisand that it had consulted the Attorney General and the Attorney General had advised it that "Technisand is a new legal entity and acquired the properties after July 5, 1989 and are not eligible for the exception under Section 2b of Act No. 22." PTD App 8b. Therefore, said the agency, it would not issue the requested permit, but Technisand could resubmit the application "with the Critical Dunes removed." *Id.* (So far as the record shows, Technisand took no issue with the DNR's conclusion. The next event the record shows occurred more than a year later when, after a change in the Governorship, the newly created DEQ invited Technisand to resubmit its application. PTD App 10b.)

None of Technisand's assortment of arguments as to why the statute does not mean what its words say can survive close scrutiny.

Technisand professes to find great significance in the fact that § 63704 of the statute uses the words "person or operator" in the "disjunctive" (Tech. Br 31), but Technisand fails to explain what relevance that "disjunctive" has to the case. The use of the disjunctive in § 63704 is easily accounted for. That section (unlike § 63702) is addressed to new permits as well as renewals or amendments, and an applicant for an initial permit might well be a "person" but not yet an "operator." (All operators are persons but not all persons are operators.) Section 63702, on the other hand, is concerned only with amendments to permits, and it consistently refers to the applicant in question as "the operator." If Technisand's aim is to suggest that the Legislature used terms loosely, it is simply mistaken.

The statute defines the term "operator." MCL 324.63701(j). It says an operator is "an owner or lessee of mineral rights" or any other "person" engaged in or preparing to engage in sand dune mining. The first part of the definition, emphasizing ownership, is fully consistent with the Legislature's use of the word "operator" in subsection (b) of § 63702, which focuses on the date when the "operator" acquired its ownership of the land or mineral rights in the critical dune area.

The statute does not define "operation" but uses that term in § 63706(2), where it distinguishes between "operations" existing before and after a certain date (i.e. the date four months before the date on which sand dune mining permits were first required). This section shows clearly that when the Legislature wished to grandfather "operations" as distinguished from "owners" or "operators" it knew how to do so. The terms used in the exception defined by subsection (b) of § 63702 were used with precision and in harmony with other parts of the statute.

In short, Technisand's argument that subsection (b) was meant to refer to operations, not operators, finds no support whatever in the text of the Sand Dune Mining Act. (And if the Legislature *had* intended in subsection (b) to grandfather operations, it is highly doubtful that it would have intended "the same operation" to cover an operation by a new (and much larger) owner that enlarged an existing mine from 23 acres to 150 acres and planned to remove some 8 millions tons of sand as compared with the 50,000 tons authorized for removal under the existing operation! See PTD App 16b.)

Technisand argues that the Legislature was "balancing competing interests" and meant to "preserve ongoing sand mining operations." Tech. Br 32-34. The statement is no doubt true up to a point, but does not help Technisand's case. The Legislature also mean to bring an end to the

mining of critical dunes. The question is where it struck the "balance," and that balance is reflected in the language of the statute. Specifically, the Legislature forbade the *expansion* of existing operations into new critical dune areas except under the circumstances described in subsection (b) of § 63702. Technisand's "balancing" argument simply invites the Court to disregard the unambiguous language of the statute.

Technisand quotes a House Legislative Analysis (Tech. Br 35, top of page) that it claims supports its position. Where a statute is clear and unambiguous on its face, as § 63702(1)(b) is, legislative history may not be used to contradict it (*Robinson v Detroit,* 462 Mich 439, 460; 613 NW2d 307, 318 (2000)), and anyway a Legislative Analysis is a "feeble indicator" of legislative intent (*Frank W Lynch & Co v Flex Technologies, Inc,* 463 Mich 578, 587; 624 NW2d 180, 184 (2001)). But the passage quoted by Technisand merely paraphrases the statute quite accurately, and does not support Technisand's arguments. And the Legislative Analysis quoted by Technisand at the bottom of page 35 is wholly irrelevant – it pertains to legislation enacted thirteen years before the prohibition on new mining of critical dunes was enacted.

Technisand's extended argument that "the manner of its acquisition" of the property is "not determinative" (Tech. Br 36-40) is but another effort to have the Court rewrite the clear language of the statute. In so far as this section of Technisand's brief is not just a repetition of arguments that have already been answered above, its point seems to be that treating Technisand as a new owner of the critical dune area is somehow resorting to a "corporate fiction" or "corporate formalities," and allowing "niceties of corporation law" to prevail over substance.

Such characterizations are wholly misplaced. The fact that a transfer of property to a new owner occurred when Technisand bought its predecessor's operation is not a "fiction" or a "legal nicety" but a fundamental legal fact. There was a complete change not only of legal title but of

beneficial ownership. It is Technisand that wants to resort to a fiction, by arguing that if it had bought stock rather than assets there would have been no change in ownership. But Technisand cannot bring itself within subsection (b) by hypothesizing a different transaction than the one that actually occurred. Technisand could equally well argue that if it had only bought the property before July 5, 1989 it would have qualified, and "What's the difference?" Legislation is addressed to events as they actually occur, not as someone might imagine or wish that they had occurred. Moreover it is far from clear that Technisand would have qualified for the exemption even if it had bought its predecessor's stock. It would not have been the same case as if a few shares in a publicly held corporation had changed hands. Technisand bought the entire beneficial interest and was a new owner in substance and not just in "form." Had the transaction been a stock purchase, the question would have been whether the evident purpose of the statute could be defeated by resort to the corporate "fiction." But that question need not be addressed in this case.

The major fallacy that permeates Technisand's arguments is the assumption that a change of ownership is irrelevant to the objective of the grandfathering provision of § 63702, rather than the cornerstone of the Legislature's policy, which it is. What Technisand chooses to overlook is the fact that if Technisand were entitled to mine the critical dune area, any successor of Technisand would also entitled to do so, without limit. Such a result would not merely impair the policy embodied in § 63702 -- it would nullify the policy.

Technisand's final argument (Part III,D, pp 40-42) is that "the balance of interests" favors "mining the Nadeau Site Expansion." The argument seems to assume that the Court may, if it chooses, disregard the Legislature's decision to protect critical dune areas in Michigan from

new mining. Technisand cites no authority for such an assumption and we are aware of none. The argument is one that should be addressed to the Legislature rather than to the Court.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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